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September 24, 2018

Via electronic filing and email (Linda.Dreeben@NLRB.gov)

Linda Dreeben, Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

Re: *Time Warner Cable of New York City LLC and IBEW Local Union No. 3*
Case No. 02-CA-126860
Our File No. 25182.0056

Dear Ms. Dreeben:

Charging Party Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO ("Local 3") submits this response in opposition to the "renewed" request of Respondent Time Warner Cable New York City, LLC ("Time Warner Cable" or "Respondent") for reconsideration of the Board's decision in *Time Warner Cable New York City LLC (I.B.E.W. Local 3),* 366 NLRB No. 116 (June 22, 2018).

Respondent's "Renewed Motion for Reconsideration" is untimely. Respondent's motion was filed on September 20, 2018, more than 28 days after service of the Board's June 22, 2018 decision as required by Section 102.48(c)(2) of the Board's Rules and Regulations.

Respondent still has not filed a motion for late filing nor does the affidavit signed by Respondent's attorney set forth facts demonstrating "good cause...based on excusable neglect" for its late filing as required under Section 102.2(d) of the Board's Rules and Regulations. A Board decision issued on August 22, 2018 does not provide good cause based on excusable neglect under the Board's Rules and Regulations to submit an untimely renewed request for reconsideration on September 20, 2018, seeking reconsideration of a Board decision issued almost three (3) months earlier on June 22, 2018.

Respondent's renewed request should also be denied for the reasons previously set forth in Local 3's Brief in Opposition to Respondent's first untimely request for reconsideration annexed

hereto as Exhibit "A," which is hereby submitted in opposition to Respondent's "Renewed Motion for Reconsideration."

Very truly yours,

Marty Glennon

Marty Glennon

MG:am
Enc.
cc: Allen Rose (Allen.Rose@NLRB.gov)
Kenneth A. Margolis, Esq. (margolis@kmm.com)

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Exhibit A

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TARRYTOWN ADDRESS:
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September 10, 2018

Via email (Linda.Dreeben@NLRB.gov)

Linda Dreeben, Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

Re: *Time Warner Cable of New York City LLC and IBEW Local Union No. 3*
Case No. 02-CA-126860
Our File No. 25182.0056

Dear Ms. Dreeben:

Enclosed please find I.B.E.W. Local Union No. 3's response in opposition to the request of Respondent Time Warner Cable New York City, LLC for reconsideration of the Board's decision in the above matter.

Very truly yours,

Marty Glennon

MG:am
Enc.
cc: Allen Rose (Allen.Rose@NLRB.gov)
Kenneth A. Margolis, Esq. (margolis@kmm.com)
763737

UNITED STATED OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Time Warner Cable New York City, LLC,

and **Case 02-CA-126860**

Local Union No. 3, International Brotherhood of Electrical Workers, AFL- CIO.

BRIEF IN OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION

Charging Party Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO ("Local 3") submits this response in opposition to the request of Respondent Time Warner Cable New York City, LLC ("Time Warner Cable" or "Respondent") for reconsideration of the Board's decision in *Time Warner Cable New York City LLC (I.B.E.W. Local 3),* 366 NLRB No. 116 (June 22, 2018) pursuant to 29 C.F.R. § 102.48(c).

ARGUMENT

Respondent's request for reconsideration, filed seventy-five (75) days after issuance of the Board's decision, is untimely, does not present any extraordinary circumstance warranting reconsideration under § 102.48(c), contains only legal argument as to why Respondent disagrees with the Board's decision, cites to a distinguishable recent decision in an unrelated case as the sole basis for Respondent's request for reconsideration, and is contrary to the principles of finality and administrative economy recognized by the Board.

1. Respondent's Request for Reconsideration is Untimely.

"Any motion pursuant to [§ 102.48(c)] must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order..." § 102.48(c)(2). Respondent filed its request for reconsideration seventy-five (75) days after the Board's decision in *Time Warner Cable New York City LLC (I.B.E.W. Local 3),* 366 NLRB No. 116 (June 22, 2018). There is no new evidence raised in Respondent's motion and the exclusive basis of Respondent's request is the Board's decision in *Preferred Building Services, Inc.*, 366 NLRB No. 159 (August 28, 2018). Unlike requests to reopen the record which may be filed "promptly on discovery of the evidence to be adduced," § 102-48(c)(2), there is no provision in the Board's Rules and Regulations that permits late filing of a request for reconsideration after the Board issues a decision that a party may think is analogous to an earlier decision. Respondent's request for reconsideration is untimely and must be denied.

2. Extraordinary Circumstances Do Not Exist.

The Board's rule regarding motions for reconsideration requires "extraordinary circumstances" to warrant reconsideration of a Board decision. § 102.48(c). Furthermore, "[a] motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on." § 102.48(c)(1). Respondent's sole basis for requesting reconsideration is a finding in a subsequently-decided Board decision in an unrelated case. There are no new facts referenced in Respondent's motion that were not adduced in the underlying proceeding nor recently-discovered material errors identified that warrant reconsideration.

Subsequent Board decisions, including changes in Board law or changes in Board composition, are not extraordinary circumstances under § 102.48(c). *See, Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1237 (1954); *Visiting Nurse Health System*, 338 NLRB 1074 (2003) (changes in the composition of the Board after the issuance of a decision is an inappropriate ground for reconsideration). The Board routinely issues decisions and each new decision does not provide the extraordinary circumstances necessary to revisit and reconsider its earlier decisions.

Moreover, Respondent offers no explanation for why *Preferred Building Services, Inc.*, 366 NLRB No. 159 (August 28, 2018), even if it were applicable to this case, should be applied retroactively or why it constitutes material error for the Board not to have considered the specific findings or conclusions of law in *Preferred Building Services, Inc.*, decided on August 28, 2018, when resolving *Time Warner Cable New York City LLC (I.B.E.W. Local 3)*, 366 NLRB No. 116, decided on June 22, 2018. The Board did not provide for *Preferred Building Services, Inc.* 366 NLRB No. 159 (August 28, 2018) to have retroactive effect in its decision.

Respondent presents legal argument as to why it disagrees with the Board's decision based on a subsequently-decided decision in an unrelated case, but it has not identified any appropriate material error or demonstrated extraordinary circumstances warranting reconsideration under the Board's rule. *See, Pressroom Cleaners, Inc.*, 361 NLRB 1166 (2014) (denying request for reconsideration).

3. *Preferred Building Services, Inc.*, 366 NLRB No. 159 (August 28, 2018) is Distinguishable.

The case relied on by Respondent as the sole basis for its request for reconsideration is factually dissimilar from the instant case. In *Preferred Building Services, Inc.*, 366 NLRB No. 159 (August 28, 2018), employees lost protection of the Act because they engaged in picketing with a secondary object prohibited by NLRA § 8(b)(4)(ii)(B). As noted by Respondent, the Board dismissed allegations in the complaint because the "allegations involve[d] the Respondents' reactions to the unprotected picketing." Here, there was no secondary activity alleged by Respondent as an affirmative defense to the unfair labor practice charges and none of the interrogations involved unprotected secondary activity. The Board's conclusions in *Preferred Building* Services, 366 NLRB No. 159 (August 28, 2018), that the employer's conduct was in reaction to the employees' unprotected secondary activity, would not have been on point, let alone controlling, even if decided before the instant matter.

Notwithstanding their distinguishability, both decisions contain detailed factual determinations and sensibly link the permissible scope of employer conduct under the Act with the nature of the employees' unprotected conduct. Consistent with *Preferred Building Services, Inc.*, 366 NLRB No. 159 (August 28, 2018), the Board has already affirmed that Respondent's interrogations went well-beyond the scope of the employees' unprotected activity and intruded upon protected § 7 activity.

4. Respondent's Request for Reconsideration is Contrary to Principles of Finality.

Granting Respondent's request for reconsideration would invite requests to reconsider long-decided cases every time the Board issues a new decision. "In the interests of finality and administrative economy, motions for reconsideration are disfavored…Indeed, reconsidering cases [under new Board composition] may even invite motions for reconsideration, if losing parties believe that new Board Members may be more sympathetic to their positions." *KSM Industries Inc.*, 337 N.L.R.B. 987 (2002) (Member Liebman, concurring) (granting reconsideration to delete two sentences containing mistake of "material facts" and denying reconsideration of ultimate result due to lack of extraordinary circumstances to warrant reversal of conclusions of law).

Obviously, indefinite reconsideration of the Board's decisions is an unworkable and undesirable practice not intended by § 102.48(c) and would essentially result in Board decisions that are never final. Under the basis for reconsideration offered by Respondent, cases finally resolved by the Board decades ago could be reconsidered and continually revisited at any time due to the development of Board law.

In denying a motion for intervention and reconsideration of a Board decision, the Board has recently expressed the concern that if parties with claimed interests were permitted to intervene and move for reconsideration after a decision is issued:

> there would be no finality to any decision; the Board would be continually revisiting its decisions on motions to intervene and for reconsideration…It serves no purpose and certainly does not advance the fundamental purpose of the NLRA—to promote industrial peace—to keep workplace disputes unresolved…Even if unsuccessful, their motions would waste the Board's time and resources.

The Boeing Company, 366 NLRB No. 128, fn. 3 (July 17, 2018).

The same interests in finality and administrative economy are implicated by Respondent's request for reconsideration here. The Board cannot reconsider all of its past cases, at the behest of parties to such cases, every time it issues a new decision.

CONCLUSION

Respondent's request for reconsideration should be denied. It is untimely under § 102.48(c)(2); it does not present any extraordinary circumstance or particularize any material error warranting reconsideration under § 102.48(c); it contains only legal argument as to why Respondent disagrees with the Board's decision; it cites to a distinguishable recent decision in an unrelated case as the sole basis for the request; and it is contrary to the principles of finality and administrative economy recognized by the Board.

Dated: September 10, 2018
Melville, New York

Respectfully submitted,

Marty G. Glennon
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